February 1, 2006

Sent Via Electronic Mail

Roberta Recker
Baker & Daniels
300 N. Meridian Street
Suite 2700
Indianapolis, IN 46204

Re: Informal Inquiry Response; Whether Personal Electronic Mail is a Public Record

Dear Ms. Recker:

On January 16, 2006 you requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

Specifically, you have asked me the following question:

> "Is private e-mail correspondence sent and/or received on the public agency's computer a public record under the statute? By 'private correspondence' I mean personal or social correspondence entirely unrelated to any governmental purpose."

Your question regards the Access to Public Records Act ("APRA"). The public policy of the APRA is that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code 5-14-3-1. Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information. The Access to Public Records Act is to be liberally construed to implement this policy. IC 5-14-3-1.

Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of the APRA. IC 5-14-3-3(a). "Public record" is defined in the APRA as:

> "any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics."

IC 5-14-3-2(m).

I believe your question to be whether e-mail of a personal or private nature comes within the definition of "public record." In other words, you are asking whether such an e-mail is subject to the APRA in the first place. I understand your question *not* to be whether the record, once determined to be a public record, is disclosable or not. Answering this latter question would require an understanding of the content of the e-mail, and no facts are before me from which I could draw any conclusion about whether a given e-mail must be disclosed.

There is no question that a public record would include an electronic mail message, and I do not believe your question centers on the format in which the information is created or maintained. Indeed, the definition of "public record" includes electronically stored data, or any other material, regardless of form or characteristics. *See* IC 5-14-3-2(m). Rather, your question concerns the private or personal nature of the e-mail message itself, and whether correspondence entirely unrelated to any governmental purpose, but created, received, or retained on a public agency's computer, would come under the APRA.

There are few helpful precedents in Indiana on the subject of what records come within the ambit of the Access to Public Records Act. In holding that an affidavit given by a small claims court judge was *not* a public record, the court of appeals held that the court did not "receive" the writing within the meaning of "public record." *Wooley v. Washington Township Small Claims Court 804 N.E.2d 761 (Ind. Ct. App. 2004).* In that case, the small claims judge who had reviewed and signed an affidavit drafted by an attorney, and did not retain a copy of it, had not "created, retained, maintained or filed" the record with the court. Moreover, the judge did not exercise sufficient possession and control of the affidavit, and therefore did not "receive" it. In addition, the affidavit was not a public record of the court just because the affidavit concerned the proceedings of the small claims court. Rather, the judge was simply attesting to facts that were within her knowledge like any affiant that was not a public official. *Id.* at 765.

In a more recent case, *The Knightstown Banner v. Town of Knightstown, 838 N.E.2d 1127 (Ind. Ct. App. 2005)* the appellate court held that a settlement agreement drafted by a private attorney on behalf of the Town and maintained only by the attorney, was nevertheless a public record. The fact that the Town had never been in possession of the record was not dispositive. *Id.*

These cases are not instructive to the question you pose, which assumes that the record is in the public agency's possession when a request for the e-mail is received by the public agency, and the e-mail is sent or received, and stored, on the public agency's server. Rather, you

question whether it matters that the contents of the message are entirely unrelated to a government function, or at least to the governmental function of the public official who sent or received the message.

I considered cases in other jurisdictions. A Florida Supreme Court case involved a request from a reporter that the City of Clearwater provide copies of all e-mails that were sent or received by two city employees over the city's computer network during a specified period of time. *State v. City of Clearwater, 863 So.2d 149 (Fla. 2003.).* Some e-mails that were omitted from the production were deemed by the employees of the City to be "personal." No one else had reviewed the e-mails deemed by the employees to be personal.

In Florida, access to public records is guaranteed not only by statute but by the Florida Constitution. Under the latter, every person has a right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee... *Id.* (Citations omitted). Florida's statute defines public records as all documents, papers, letters...or other material...made or received pursuant to law or ordinance or in connection with the transaction of official business of any agency. *Id.* (Citations omitted). The Florida Supreme Court held that, based on the plain meaning of the statute, private or personal e-mails fall outside the definition of public records. This was because such e-mail is not made or received pursuant to law or ordinance, and was not created or received in connection with the official business of the City. *Id.* at 153. Just as the lack of physical custody of a public record in the public agency does not alter the nature of a record as a public record, private documents are not deemed public records solely by virtue of their placement on an agency-owned computer. The determining factor was the nature of the record, not its physical location. *Id.* at 154. Two other jurisdictions have made similar holdings under statutes that are similar or identical to Florida's. *See Denver Publishing Co. v. Board of County Commissioners, 121 P.3d. 190 (Colo. 2005); Brennan v. Giles County Board of Education, 2005 Tenn. App. LEXIS 503 (Tenn. Ct. App. 2005).*

Indiana's definition of public records is broader than Florida's definition. In particular, the Indiana General Assembly did not define "public record" with respect to the content or purpose of the material itself, just that the material be created, received, retained, maintained, or filed by or with a public agency.

A New York case is instructive. In *Matter of Capital Newspapers v. Whalen, 69 N.Y.2d 246, 505 N.E.2d 932 (1987),* petitioner newspaper sought correspondence of a former Mayor of Albany, Erastus Corning, concerning matters of a personal nature and correspondence concerning the activities of the Albany County Democratic Committee. The New York high court held that, giving the Freedom of Information Law's ("FOIL") definition of "record" its natural and obvious meaning, the personal papers of a former mayor stored and maintained by the City of Albany are within the ambit of the FOIL. In New York, the definition of records under FOIL was similar to Indiana's. "Record" was defined as: "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever, including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilm, computer tapes or discs, rules, regulations or codes."

The New York court found nothing in the policy of the FOIL to suggest that the legislature intended that the definitions of "record" and "agency" should be restricted to records dealing with the governmental decision-making process. 505 N.E.2d. at 935. Hence, the court held that the Corning papers were records under the FOIL, finding no support in the statute or legislative history for a construction that a record's subject matter must evince some governmental purpose. 505 N.E.2d at 936.

In *Capital Newspapers*, the court was asked to consider the correspondence outside the ambit of "record" because the records had been kept by ex-Mayor Corning in his individual capacity, not as an officeholder. Therefore, respondents argued, an "agency" did not keep or hold the documents. The court rejected this argument, because the newspaper did not seek the documents while they were being kept or held by Corning. Rather, disclosure was sought from the City of Albany, which had custody of the papers and was storing them. 505 N.E.2d at 935.

I did not find a case in a jurisdiction with a liberal definition of "public record" like Indiana's, where personal or private e-mails were the targeted record.

Indiana's Access to Public Records Act is to be liberally construed to implement the policy of the APRA. IC 5-14-3-1. From this general rule, it is apparent to me that the mere fact that the e-mail is personal or unrelated to a governmental purpose is not dispositive. In *Capital Newspapers*, the court dismissed the argument that the record must bear some relation to a governmental function, and Indiana's definition is as broad as the definition of "record" in New York. Clearly, "public record" is not limited by the actual or apparent governmental context of the record. *See* IC 5-14-3-2(m). Nevertheless, the mere fact that a document is kept or held in the office of a governmental official or employee does not mean that it is a "public record." This is illustrated by several scenarios, pointed out in the *City of Clearwater* case, of the attorney general bringing personal bills to work and keeping them temporarily in his office drawers, or the secretary who brings her grandchildren's artwork to her state office and tacks it onto the walls of her office. I do not believe that the attorney general's bills or the secretary's artwork are public records, even in Indiana, because those records are not "created, received, retained, maintained, *or* filed by or with a public agency. This is consistent with this office's precedents, which state that a record requested of a public *employee* is not necessarily a request directed to a public *agency*. *Opinions of the Public Access Counselor 02-FC-61; 00-FC-38.*

However, considering the APRA's broad definition of "public record," an e-mail that is sent, received, or stored on the public agency's computer server may well be "maintained or retained" by the public agency that provides the server, even if the message of a personal nature is "created" by an individual public employee rather than the public agency. At a minimum, a personal or private e-mail, even if not a public record upon its creation, becomes a public record if, for example, a recipient of the message finds it offensive and lodges a complaint about it to the sender/public employee's supervisor. This distinction illustrates the difficulty in assessing whether a given e-mail is a public record based on the perceived governmental purpose of the message. Governmental purpose as a limitation on the meaning of "public record"

> "would be difficult to define...because of the expanding boundaries of governmental activity and because in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons."

Capital Newspapers, 505 N.E.2d at 936.

I hope that this guidance is helpful to you. Please feel free to call or write me if you have any questions.

Sincerely,

Karen Davis
Public Access Counselor